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Friday, June 16, 2000

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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re:

MARC and DENISE THORPE,

No. 98-11963

[Debtor](#) ⓘ(s).

Memorandum of Decision

Debtor Marc Thorpe is a free-lance designer and model maker. About ten years ago, he came up with an idea for a competition involving radio-controlled robots designed to do mayhem to one another in a sort of mechanical cockfight. He called his idea Robot Wars. In 1994, Thorpe entered into a business transaction with Profile Holdings, Inc., whereby Profile would become a joint venturer with Profile in Robot Wars; Thorpe was to provide the ideas and Profile the financing. The principal of Profile is Steven Plotnicki, who appears to be almost a caricature of an East-coast entrepreneur: brash, aggressive, combative, and quick to litigate. Thorpe appears to be his exact opposite: West coast reserved, quiet, personable, naive. With the benefit of hindsight, a 50-50 partnership between the two of them had no chance of succeeding. While Robot Wars could not have taken off without

Profile's financing, Thorpe became more and more uncomfortable with Profile as a business partner. The essence of whatever success Robot Wars has enjoyed is a small group of dedicated robot builders anxious to compete against each other. Thanks to the Internet, Thorpe was able to build a very personal relationship with them. This personal relationship, and Thorpe's inability to make the builders comfortable with Profile, has resulted in the impasse now before the court. Prior to Thorpe's [Chapter 11](#) filing, he and Profile were locked in litigation in New York. Two tentative settlements of that litigation broke down,⁽¹⁾ and Thorpe was unsuccessful in obtaining court permission to produce a Robot Wars event over Profile's objection. Thorpe then filed a Chapter 11 petition in this court, hoping to use the bankruptcy proceedings to divest Profile of its interest in Robot Wars. In late 1998, at this court's (in hindsight naive) suggestion, the parties again entered into settlement discussions and this time reached a signed agreement.⁽²⁾ Under the agreement, Thorpe was to receive \$250,000.00 cash and 10% of receipts. All he had to do in return for this was to use his best efforts to promote Robot Wars, secure certain rights from robot makers, and use his best efforts to rehabilitate Profile's reputation, which had been severely damaged by litigation. Unfortunately, Thorpe was unable to perform these obligations. Like all good settlements, the agreement Thorpe and Profile reached left neither of them happy. However, based on his concept of "honesty," Thorpe proved utterly incapable of putting on a happy face for the Robot Wars participants. His lukewarm communications with them made it clear that he was not happy with the settlement and considered Profile to be a malevolent force. He really did nothing to quell the strong feeling among the participants that Robot Wars would be much better without Profile. Both sides agree that anything before the signed settlement agreement is history. Thorpe takes the position that he performed under the agreement and Profile did not. The result he says, is that Profile no longer has any sort of [claim](#) against him and no right to vote on the [plan](#). Profile takes the position that Thorpe breached the agreement and is liable to it for damages. The matter came before the court on a motion to estimate Profile's claim pursuant to § 502(c)(1) of the [Bankruptcy Code](#). The court rejects Thorpe's primary contention, that he is excused from performance because Profile did not pay the \$250,000.00. The agreement makes it clear that the parties did not intend immediate payment but rather a structured payment, pursuant to plan, so that tax burdens were minimized. Most tellingly, Thorpe made no demand for payment. The court further rejects Thorpe's contention that he lived up to his side of the bargain. His agreement did not call for him to be "honest" with the participants; it called for him to bring them back into the Robot Wars fold. If he could not do this in good faith, he should not have made the agreement. He was not free to take Profile's money and then tell the participants that Profile made him do it. That may have been the truth, but it was not what Profile bargained for. Thorpe breached paragraphs 7a and 9 of the agreement, as well as the implied covenant of good faith. Assessment of damages is problematical, as Profile is its own worst enemy. By bringing suit against two enthusiastic participants, it alienated both Thorpe and the participants as a whole. The court has great difficulty determining how much of Profile's losses is the result of Thorpe's breach of the contract and how much is the result of Profile shooting itself in the foot.⁽³⁾ However, the court estimates for plan [confirmation](#) purposes that Profile's damages are \$500,000.00, less the \$250,000.00 due to Thorpe, for a net of \$250,000.00. Counsel for Profile shall submit an appropriate form of order.

Dated: June 16, 2000

Alan Jaroslovsky

1. The district judge in New York expressed great frustration with the failure of the parties to reach an agreement. She could see, as this court can, that both sides would be substantial losers if there was no settlement. Unfortunately, settlement between these parties seems impossible.
2. The court had given Thorpe strong indications that his plan would not be confirmed.
3. In fact, the court suspects that its decision here in favor of Profile will end up costing Profile far more than it will ever r

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